

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL
RIGHTS AS TO A.M.

No. 81098-COA

GIANO AMADO,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MATHEW HARTER, DISTRICT JUDGE,

Respondents,

and

JENNIFER MARIE MARTINEZ,
Real Party in Interest.

FILED

NOV 25 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus seeks disqualification of a district court judge in a termination of parental rights action.

Petitioner, Giano Amado, and real party in interest, Jennifer Marie Martinez, have one child together, A.M.¹ Besides the instant proceeding regarding parental rights, the parties have engaged in highly contested litigation regarding custody of A.M. Judge Mathew Harter has presided over all of the parties' family court proceedings. After Amado established paternity of the child in 2012, he and Martinez shared joint legal and joint physical custody (the custody case). In 2016, the district court granted Amado sole legal and physical custody due to Martinez's

¹We recount the facts only as necessary for our disposition.

substance abuse. Martinez was required to complete a rehabilitation program before she could regain custody. In June 2018, the district court awarded Martinez parenting time and later awarded joint physical custody. In August 2018, Martinez moved the court to modify custody, alleging that Amado was abusing the child.² The district court granted Martinez temporary sole legal and physical custody.

At a hearing in September 2018 regarding the allegations of child abuse, Amado claimed the allegations were fabricated. Amado apparently became frustrated because the district court would not consider his side of the story and instead said it would set an evidentiary hearing in January. Amado then offered to relinquish his parental rights. The district court immediately instructed Martinez that in order for Amado to relinquish his rights, Martinez would have to file a petition to terminate parental rights. The court encouraged her to file the petition quickly. The court continued sole legal and sole physical custody of the child with Martinez and did not award Amado any parenting time.

In March 2019, Martinez filed a petition to terminate Amado's parental rights as to A.M. (the termination case). At the petition hearing for the termination case in April 2019, Amado told the district court that he changed his mind and did not want to relinquish his rights.³ The court sua sponte appointed Martinez counsel to prosecute the termination case, did

²The record before this court does not indicate whether these allegations ever moved forward or were resolved. The allegations were before child protective services, which apparently closed the case, and according to Amado, no court action was initiated. The record does not show that the parties mentioned these allegations in later proceedings.

³Amado was represented by unbundled counsel at this initial proceeding, and Martinez appeared pro se.

not appoint counsel for Amado or the child, and declined to award Amado any parenting time. The district court scheduled an August 2019 trial for the termination case.

After the April hearing for the termination case, Amado, acting pro se, submitted in the custody case, a one-page proposed custody order that memorialized the September custody hearing ruling, which awarded Martinez sole legal and physical custody of the child. The district court entered the custody order in May, and Amado filed a motion to reconsider because the order did not address the statutory best interest factors under NRS 125C.0035(4).⁴ He also reasserted that he no longer wanted to relinquish his parental rights. The district court denied Amado's petition to reconsider the custody order but failed to address why it did not consider the best interest factors when it awarded Martinez sole legal and physical custody. Amado subsequently appealed the custody order and sought to disqualify Judge Harter from the custody case (the custody appeal).

Amado then filed a motion to stay the termination case pending the outcome of the custody appeal. The district court denied the motion during an August 2019 calendar call but agreed to continue the proceedings at Amado's request so he could seek an emergency stay from the Nevada

⁴The custody order memorialized the ruling from the bench and the subsequent minute order from the September 2018 hearing. The district court did not address the best interest factors for child custody at the September 2018 hearing.

Supreme Court. Amado filed emergency petitions to stay the termination proceedings, which were ultimately denied.⁵

In December 2019, Amado filed a motion in the district court to disqualify Judge Harter from the termination case. Chief Judge Bell denied the motion, finding that Amado did not establish sufficient factual or legal grounds for disqualification. Amado filed a motion to reconsider this decision, which was also denied. After another continuance,⁶ the termination case was set for trial in March 2020. However, due to restrictions from the COVID-19 pandemic, the district court again continued the termination case.

⁵*Amado v. Martinez*, Docket No. 79122-COA (Order Denying Stay, Ct. App., Dec. 31, 2019); *In the Matter of the Parental Rights as to A.M.*, Docket No. 80624 (Order Denying Petition for Writ of Mandamus, March 19, 2020).

⁶The district court issued the continuance sua sponte because (1) it had not yet received the court of appeals' order denying Amado's petition to stay the proceedings, (2) it had not yet received a ruling on Amado's motion to disqualify from the district court, and (3) Amado had filed two new motions in the termination case. The district court did not address NRS 128.055 ("[T]he court shall use its best efforts to ensure that proceedings conducted pursuant to this chapter are completed within 6 months after the petition is filed."). See also SCR 251 ("In all cases affecting the custody or visitation of minor children including, but not limited to action seeking termination of parental rights . . . the district courts must resolve the issues . . . within six months of the date that such issues are contested by the filing of a responsive pleading that contests the custody or visitation issues. Extraordinary cases that present unforeseeable circumstances may be subject to extensions of time beyond the six-month period only upon entry by the court of specific findings of fact regarding the circumstances that justify the extension of time.").

In June 2020, this court issued an order of reversal and remand in the custody appeal.⁷ In that appeal, Amado argued that Judge Harter should be disqualified from the custody case. This court disagreed with Amado on that issue, concluding that, looking at the record as a whole in the custody case, there was not a sufficient showing of bias that would impede the judicial process. In our order, we noted that “some of the district judge’s comments and actions may appear in a different light in the termination of parental rights proceeding” which was not before this court at the time. *Amado v. Martinez*, Docket No. 79122-COA at 7, n.5 (Order of Reversal and Remand, Ct. App., June 29, 2020).

After entry of this court’s order, the district court issued a notice to continue the termination case while awaiting remittitur from the custody appeal. In the notice, the court stated that it would reset the termination trial once it resolved the issue remanded from the custody appeal.

In April 2020, Amado filed the instant writ petition seeking to disqualify Judge Harter from the termination case and, in May, the supreme court ordered Martinez to respond. Amado argues that Judge Harter must be disqualified because his words and actions demonstrate that he harbors antagonism towards Amado. Amado contends that, taken together, the district judge’s words and actions create a reasonable doubt as to the court’s impartiality in the termination case. Amado also asserts that the court has shown that it has a pre-determined outcome in mind for the termination case. Martinez counters that Amado has not shown substantial

⁷*Amado v. Martinez*, Docket No. 79122-COA (Order of Reversal and Remand, Ct. App., June 29, 2020). In the custody appeal, Amado argued that the district court improperly awarded Martinez sole legal and physical custody of the child without making any findings regarding the best interest of the child. This court agreed and reversed and remanded the matter.

evidence requiring disqualification and that the district court is not biased. We agree with Amado.

“A writ of mandamus is available to compel the performance of an act required by law or to control an arbitrary or capricious exercise of discretion.” *Mulkern v. Eighth Judicial Dist. Court*, 134 Nev. 684, 686, 429 P.3d 277, 278-79 (2019); NRS 34.160. This court has discretion to consider a petition for extraordinary relief and will not do so when the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170; *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736-37 (2007). The petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). “[A] petition for a writ of mandamus is the appropriate vehicle to seek disqualification of a judge.” *Ivey v. Eighth Judicial Dist. Court*, 129 Nev. 154, 158, 299 P.3d 354, 357 (2013) (alteration in original) (quoting *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 254-55, 112 P.3d 1063, 1066 (2005)).

The party seeking disqualification has the burden to prove that it is warranted. *Kirksey v. State*, 112 Nev. 980, 1006, 923 P.2d 1102, 1118 (1996). The district court’s impartiality is reviewed de novo based on objective facts. *See Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). Disqualification is appropriate where the judge has an actual bias or prejudice against a party to the action. NRS 1.230; Nev. Code of Jud. Conduct, Canon 2, Rule 2.11. Proof of actual bias is not required; “a court must objectively determine whether the probability of actual bias is too high to ensure the protection of a party’s due process rights.” *Ivey*, 129 Nev. at 159, 299 P.3d at 357.

The standard for assessing bias is “whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [a judge’s] impartiality.” *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998) (alteration in original) (quoting *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337, 341 (1995), *overruled on other grounds by Towbin Dodge, LLC*, 121 Nev. at 251, 112 P.3d at 1063)). “A judge is presumed to be unbiased” and “disqualification for personal bias requires ‘an extreme showing of bias [that] would permit manipulation of the court and significantly impede the judicial process and the administration of justice.’” *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006) (alteration in original) (quoting *City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 636, 940 P.2d 127, 129 (1997)). Judges must not disqualify themselves when there is no reason to do so, and “[a] judge’s decision not to recuse himself voluntarily is given substantial weight” *Kirksey*, 112 Nev. at 1005-06, 923 P.2d at 1118 (internal quotation marks omitted). “[J]udicial rulings alone *almost never* constitute a valid basis for [disqualification].” *Whitehead v. Nev. Comm’n on Jud. Discipline*, 110 Nev. 380, 427, 873 P.2d 946, 975 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis in *Whitehead*)).

Amado argues that the district court’s comments and actions, considered together, show that the court harbored a bias against him.⁸ The

⁸Amado points to several instances of conduct to support his claim. Amado claims that the district court exhibited bias or favoritism when it appointed Martinez counsel, but did not appoint him counsel, despite the fact that Amado was at risk of losing his parental rights. NRS 128.100(3) gives the court discretion to appoint counsel to indigent parents upon request in a termination proceeding, and there is “no absolute right to counsel in termination proceedings.” *In re Parental Rights as to N.D.O.*, 121

Nevada Code of Judicial Conduct (NCJC) Canon 2, Rule 2.2, requires that “[a] judge . . . shall perform all duties of judicial office fairly and impartially.” If the judge forms an opinion based on facts introduced at the proceedings, there may be a showing of bias if the judge displays “a deep seated favoritism or antagonism that would make fair judgment impossible.” *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119 (internal quotation marks omitted).

At the September 2018 hearing, after Amado offered to relinquish his rights, the district court cut off Amado’s explanation, saying “Why does it matter? You’re giving up your rights, Mr. Amado.” The court also said “At this point you wanna cut bait and you just wanna sign away

Nev. 379, 383, 115 P.3d 223, 225 (2005). Although it may be unusual, it was not improper for the court to appoint counsel to Martinez but not Amado, except that the court did it sua sponte when NRS 128.100(3) requires a party to request counsel. Amado did not request that he be appointed counsel and when the district court appointed counsel for Martinez, Amado was represented, albeit in an unbundled capacity. Because judicial rulings *alone* almost never constitute a basis for disqualification, the fact that the court sua sponte appointed Martinez counsel, and never appointed counsel for Amado or the child, alone does not raise a reasonable doubt requiring disqualification.

Amado also contends that the district court improperly gave Martinez legal advice during the September 2018 hearing, which led her to file the termination case. After Amado stated that he wanted to relinquish his parental rights, the court immediately instructed Martinez to file a petition to terminate parental rights, and stated “I would do that while he’s in the mood to do it.” The court also encouraged Martinez to file the petition quickly. While these statements involve what the court thought Martinez should do strategically, overall, the court was instructing Martinez how to go forward with Amado’s request to relinquish parental rights. This fact alone does not create a reasonable doubt or weigh in favor of disqualification.

your rights, you do what you need to do.” At this hearing, the court also instructed Martinez to quickly move forward with filing a petition to terminate Amado’s parental rights.

At the April 2019 petition hearing, the district court cut off Amado’s attorney’s explanation of Amado’s relinquishment statement, saying “Mr. Amado knows how to represent himself, he knows how to [get] counsel a la you, he knows this system. He’s been playing it since 2012.” It was at this April 2019 hearing when the court also sua sponte appointed Martinez counsel to prosecute the termination case, but did not appoint counsel for Amado or the child.

During the telephonic calendar call in March 2020 regarding a continuance due to the COVID-19 pandemic, Amado interrupted the district court, attempting to say that Martinez had abandoned A.M. with a babysitter. The court attempted to mute Amado, but it did not work. The transcript reflects that Amado asked if he was being muted or if the court could hear him. The court ignored Amado and continued to speak to opposing counsel, and then ended the call without addressing Amado. Lastly, in its July 2020 rescheduling notice, the district court admonished Amado for seeking disqualification from both of the appellate courts, stating that it is “clearly duplicitous, unnecessary litigation”

Considered together, these comments and actions may create a reasonable doubt as to the district court’s impartiality in this matter.⁹ See *In re Varain*, 114 Nev. at 1278, 969 P.2d at 310. It is true that, throughout

⁹We also note that while judicial rulings *alone* cannot be sufficient evidence of bias, the fact that the district court denied Amado’s request to reconsider its clearly deficient custody order after Amado said he no longer wanted to relinquish his parental rights, is another factor that may show the court harbors some bias against Amado.

Amado's and Martinez's long history of litigation in front of Judge Harter, the court made rulings both in favor of and against each party. Nevertheless, the record before this court reflects that after Amado made the statement that he wanted to relinquish his parental rights in September 2018, the district court made statements over the next 19 months that showed antagonism toward Amado and favoritism towards Martinez.

Importantly, Amado also contends that the district court has a pre-determined outcome for the termination case. Remarks of a judge made during court proceedings do not demonstrate bias unless they show "that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

During the August 2019 calendar call in the termination case, Martinez's counsel told the court he received "new information that may obviate the need for a trial tomorrow." Apparently, the termination petition was based on abandonment and neglect.¹⁰ Martinez's counsel told the court

¹⁰The parties did not include in the record the petition for termination of parental rights. However, during the August 2019 hearing, Martinez's counsel stated that the claim was based on abandonment and neglect. One of the fault grounds that termination can be based on is abandonment, which requires a showing of no provision of child support and no contact with the child for six months. NRS 128.012; NRS 128.105(1)(b)(1). Termination may also be ordered if there have been "[o]nly token efforts by the parent . . . to avoid being an unfit parent." NRS 128.105(1)(b)(6). Overall, the district court must determine that it is in the best interest of the child to terminate a parent's rights. NRS 128.105(1) ("The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination."); NRS 128.090(2) ("The proceedings are civil in nature and are governed by the Nevada Rules of Civil Procedure. The court shall in all cases require the petitioner to establish the facts by clear and convincing evidence and shall give full and careful consideration to all of the evidence presented,

that, despite counsel's previous representations that Amado had not paid child support, Amado had in fact made child support payments, negating one of the required abandonment elements.¹¹ The district court stated that "child support alone I don't think alleviates this. They're still token efforts." The record does not reflect that Martinez's counsel argued that the child support payments were token efforts. Martinez's counsel also informed the court that Martinez did not have another adoptive placement for the child.¹² While a prospective adoptive parent is not required, Martinez's counsel noted that other departments in the district require it. The district court volunteered that it did not. The court went on to explain that Amado also had no contact with the child for over six months, which satisfies the other element of the underlying abandonment claim. However, Amado, appearing pro se, tried to explain to the court he had no contact since September 2018 because the court specifically prohibited contact and did not award parenting time thereafter, despite several requests. The court commented that Amado did not come back to court between September 2018

with regard to the rights and claims of the parent of the child and to any and all blood ties or affection, but with a dominant purpose of serving the best interests of the child.").

¹¹Martinez's counsel expressly noted that child support went to the issue of parental fault because the claim was based on abandonment or neglect due to failure to support.

¹²An adoptive placement is not required to be shown when seeking to terminate parental rights. *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1425, 148 P.3d 759, 764 (2006). The availability of a prospective adoptive parent should be considered in determining whether termination of a parent's rights is in the child's best interest.

and April 2019 to try and reinstate his rights.¹³ The court's other discourse with Amado indicates that the court either did not believe Amado or did not agree that he was prevented from having contact.¹⁴

In these instances, the district court came to legal conclusions without presentation of evidence or argument from the parties, and the conclusions were contrary to the attorney's representations and the record before the court. Further, in explicitly stating that it would not require an adoptive placement before any evidence was presented, the district court was prejudging an aspect of the best-interest-of-the-child analysis. Because the court came to these legal conclusions without evidence, the court showed that it had a pre-determined outcome in mind that the termination case should go forward, and that Martinez would be able to prove that Amado's parental rights should be terminated. While the court had set the matter for evidentiary hearings or a trial throughout the proceedings, it nevertheless came to legal conclusions regarding important elements of the claim without hearing any evidence or holding a trial. The district judge's statements suggest that it has closed its mind to neutral evaluation of the

¹³After the September 2018 hearing, the court did not enter a custody order, so Amado could not request a reconsideration or appeal the order until it was entered, which was in May 2019 after Amado himself submitted the proposed order in pro se. The court vacated or never set any future hearings in the custody case, apparently because Martinez was to file the termination petition.

¹⁴Amado said, "I wasn't allowed around my daughter and then you're telling me that you're going to use that against me when you took that right away from me, Your Honor." The court responded, "I like the creative nature in which you've spun these things and we will – we will see what the record says"

evidence in the termination case and has a pre-determined outcome in mind; therefore, disqualification is necessary.

Given the serious implications of an order terminating parental rights on both the child and the parent,¹⁵ we conclude that Judge Harter should be disqualified. The district court's comments and actions toward Amado, combined with the record from the August 2019 calendar call, create a reasonable doubt as to the impartiality of the court. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the Chief Judge to reassign the termination case, Case No. D-19-586398-R, to a new judge.

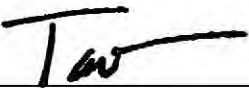

_____, C.J.
Gibbons


_____, J.
Bulla

¹⁵ “[T]he parent-child relationship is a fundamental liberty interest.” *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126, 133 (2000). “[T]he termination of parental rights is an exercise of awesome power that is tantamount to imposition of a civil death penalty” and thus an “order terminating parental rights is subject to close scrutiny.” *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014) (internal quotation marks omitted). The purpose of a termination of parental rights order is “not to punish parents, but to protect the welfare of children.” *In re N.J.*, 116 Nev. at 801, 8 P.3d at 133. Further, not only does a parent lose a child, the child loses a parent and all the support a parent can provide.

TAO, J. dissenting:

I dissent.


_____, J.
Tao

cc: Hon. Mathew Harter, District Judge
Hon. Linda Marie Bell, Chief Judge
Holland & Hart LLP/Las Vegas
Christopher R. Tilman
Eighth District Court Clerk